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Supreme Court, U.S.
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No. 97-479

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STROH DIE CASTING CO.,
Petitioner,

v.

ATLANTIC STATES LEGAL FOUNDATION, INC.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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1388

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Atlantic States cannot reconcile the significant conflict between the Seventh Circuit's decision and Hallstrom. 1

II. Government agencies, rather than private plaintiffs, are the primary enforcers of the Clean Water Act. 5

III. A single exceedence of one milligram based upon a faulty laboratory test does not make a "continuing violator". 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, (6th Cir. 1995) 3, 4

California Sportfishing Protection Alliance v. City of West Sacramento, 905 F.Supp. 792, (E.D.Ca. 1995) 2, 7, 9

Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) 8

Hallstrom v. Tillamook County, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), reh'g denied, 493 U.S. 1037, 110 S.Ct. 761 (1990) 1, 2, 3, 4, 8

Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 50 F.3d 1239, (3rd Cir. 1995) 3, 4

Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995) 4

STATUTES AND REGULATIONS

33 U.S.C. § 1251 1

42 U.S.C. § 6972 4

42 U.S.C. §7604 4

42 U.S.C. §11001 3

42 U.S.C. § 11046(d) 3

Wisconsin Administrative Code,
Chapter NR 108.02 7

Wisconsin Administrative Code,
Chapter NR 108.03 7

ARGUMENT

This case drones on with no possible purpose other than Atlantic States Legal Foundation's ("Atlantic States") attempt to garner attorney fees from Stroh Die Casting Co. ("Stroh") This case started in 1989 and has never had a hearing in the district court. It was dismissed twice by the district court -- in 1989 on the court's own motion and in 1996 on summary judgment.

Among other claims, Atlantic States bases jurisdiction on an alleged one milligram exceedence in 1992, supported only by a faulty laboratory test. It is physically impossible for Stroh to have been in violation at any of the noticed outfalls after 1990. It is also undisputed that Stroh has never been fined or sanctioned by any government agency for any violation of the Federal Water Pollution Control Act (Clean Water Act, 33 U.S.C. § 1251 et. seq.). Atlantic States' ability to keep this case on life support derives from the Seventh Circuit's mistaken and misguided decision to dilute the notice requirements of the Clean Water Act.

I. Atlantic States cannot reconcile the significant conflict between the Seventh Circuit's decision and Hallstrom.

In its Brief in Opposition, Atlantic States dons blinders and states that there is no conflict between the Seventh Circuit's interpretation of the notice requirement of the Clean Water Act and this Court's decision in Hallstrom v. Tillamook County, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d. 237 (1989), reh'g denied, 493

U.S. 1037, 100 S.Ct. 761 (1990). Hallstrom directs the lower courts to strictly construe notice provisions like the one in the Clean Water Act:

> [T]he Notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion.

Hallstrom, 493 U.S. at 31. As the various court of appeals decisions have held, these mandatory requirements are not limited to simply sending a vague notice to the requisite persons and government agencies and waiting 60 days. Rather, the notice must include meaningful information required by the statutes and regulations:

> The language of [40 C.F.R. § 135.3] does not suggest that the notice may be good enough if it generally orients the agency or violator as to the type of the violation. . . . [T]he recipient of the notice must understand from the notice what the citizen is alleging, not what the citizen could allege if the citizen knew more or cared about other possible transgressions.

California Sportfishing Protection Alliance v. City of West Sacramento, 905 F.Supp. 792, 799 (E.D.Ca. 1995).

The Seventh Circuit would allow Atlantic States to proceed with claims related to MMSD outfall 4 -- an outfall which was never included in a 60-day notice of intent to sue. As Judge Manion recognized in his dissent, the Seventh Circuit's "expansive reading" of the notice requirement runs afoul of Hallstrom's

mandate to strictly construe the notice requirement. (Appendix B, B-20)

Atlantic States stretches logic even farther in its claim that the Seventh Circuit's decision does not conflict with Atlantic States Legal Foundation v. United Musical Instruments, 61 F.3d. 473 (6th Cir. 1995) and Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 50 F.3d 1239 (3d. Cir. 1995).

In United Musical Instruments, the Sixth Circuit followed Hallstrom and rejected arguments -- synonymous with Atlantic States' arguments here -- for a vague, "catch-all" notice. In United Musical Instruments, Atlantic States (the citizen-plaintiff in that case as well) sued for a 1991 violation of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA", 42 U.S.C. §11001 et. seq.) although the violation was not included in its 60-day notice. The Sixth Circuit found that the district court lacked jurisdiction to hear this claim because Atlantic States' "catch-all" notice, which provided that a future suit would include "violations not yet known to ASLF of other EPCRA reporting requirements", was insufficient. United Musical Instruments, 61 F.3d at 478.

Atlantic States attempts to distinguish United Musical Instruments as a case arising under EPCRA, rather than the Clean Water Act. (Respondent's Brief in Opposition, 10) In presenting this "distinction", Atlantic States ignores the fact that the 60-day notice provision of EPCRA, 42 U.S.C. § 11046(d), is

substantively identical to the notice provisions in both the Clean Water Act and the Resource Conservation and Recovery Act of 1976 ("RCRA", 42 U.S.C. § 6972). See United Musical Instruments, 61 F.3d at 478; Hercules, 50 F.3d at 1246; Washington Trout v. McCain Foods, Inc., 45 F.3d. 1351, 1353 n. 3, (9th Cir. 1995). In fact, as the Court noted in Hallstrom, the notice provisions in each of these environmental laws were based upon the 60-day notice provision of the Clean Air Amendments of 1970, 42 U.S.C. §7604. Hallstrom, 493 U.S. at 23. Atlantic States' attempt to distinguish United Musical Instruments fails.

Clearly Hercules also conflicts with the Seventh Circuit's decision. In Hercules, the Third Circuit extended jurisdiction over Clean Water Act violations which the citizen-plaintiff did not specifically notice only when they are "interconnected" with violations that were noticed. Contrary to Atlantic States' claim at pages 8-9 of its Brief, the Third Circuit clearly limited "interconnected" violations to "violations of the same type (same parameter, same outfall) occurring during and after the period covered by the notice letter." Hercules, 50 F.3d at 1250. In the present case, the Seventh Circuit has moved far beyond the Third Circuit's already-relaxed reading of the notice requirement.

The Seventh Circuit's decision conflicts with the policy of strict construction set forth in Hallstrom and applied in United Musical Instruments and Hercules. The Seventh Circuit's new, flexible interpretation of the notice requirement will no doubt

invite even more citizen suits and will further burden the federal courts.

II. Government agencies, rather than private plaintiffs, are the primary enforcers of the Clean Water Act.

The installation of the new treatment system was not a scheme by Stroh to avoid detection by Atlantic States. Rather, this project, closely monitored by the permitting agency, was part of Stroh's effort to effectively treat all process wastewater. As Judge Manion stated in his dissent, the record properly supports the "conclusion that Stroh methodically and effectively addressed the problem," and did not "play[] a shell game with the regulatory authorities (and Atlantic) by constructing the new wastewater treatment [system]." (Appendix B, B-19-20)

Atlantic States' Brief in Opposition misstates the facts regarding MMSD outfall 4. Since Stroh's first permit, in July, 1989, MMSD outfall 4 was a separate monitoring and reporting station, just like MMSD outfall 3. MMSD outfall 4 is where wastewater from Stroh's parts washer and deburring were discharged. Such wastewater was still discharged there after the new treatment system was hooked up in 1990. MMSD outfall 4, as a monitoring station, was not moved or renumbered. (Appendix B, B-20)

Stroh did not repipe or install treatment equipment in response to Atlantic States' lawsuit. The lawsuit was irrelevant to what Stroh was already doing to address wastewater issues.

(Appendix B, B-16, 20) The DNR approved Stroh's plans for the new treatment system in March, 1990, weeks before Atlantic States filed its amended complaint. In fact, Atlantic States' first complaint was dismissed during the time Stroh was planning the new system and ordering equipment for it.

Atlantic States' assertion that it would require "clairvoyance" to provide a 60-day notice of intent to sue for the alleged violations at MMSD outfall 4 is pure fiction. (Atlantic States' Brief in Opposition, 15) As the district court recognized, Atlantic States most certainly could have provided Stroh, the U.S. Environmental Protection Agency, and the Wisconsin Department of Natural Resources ("WDNR"), with a notice of intent to sue for violations at MMSD outfall 4. (Appendix A, A-13-14) Stroh's first permit, in July, 1989, identified MMSD outfall 4 as a process wastewater discharge point. (Appendix B, B-20) Monitoring reports for MMSD outfall 4 were available to Atlantic States starting in 1989 -- and continued to be available after the treatment system became operational in June, 1990. (Appendix B, B-20) It would have been a "minimal imposition" on Atlantic States to provide the appropriate notice for MMSD outfall 4 and later amend its complaint.[1]

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[1] This was precisely the position taken by the United States in its amicus brief in Hercules: "As the United States discusses, if the citizen plaintiff develops reporting violations in the course of discovery there is no reason why the plaintiff cannot give the sixty day notice and then seek to amend the complaint to add the new allegations." California

Atlantic States' concerns that companies like Stroh will hire armies of plumbers to constantly shift wastewater discharges to different outfalls in order to avoid citizen suits is misplaced and silly. (Brief in Opposition, p.15) For one thing, each outfall, by its permit definition, is subject to specific effluent discharge limitations. Obviously, the permit-issuing authority cannot allow a company to maintain "spare" outfalls or to constantly shift and redefine outfall locations.[2]

Atlantic States has ignored the significant concern raised by Stroh in its Petition that allowing Atlantic States to pursue claims at an outfall which was never noticed frustrates the second purpose of notice under the Clean Water Act. That purpose -- allowing government entities to enforce the Clean Water Act and thereby avoid a citizen suit -- is particularly significant in this case. At the time Atlantic States filed its Amended Complaint, Stroh was working closely with government enforcement agencies to eliminate potential problems through the permitting process. (Appendix B, B-19-20) The District Court properly recognized

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Sportfishing Alliance v. City of West Sacramento, 904 F.Supp. 792, 799 n. 7, (E.D.Ca. 1995).

[2] It is impossible to play a regulatory "shell game" as suggested by Atlantic States. The WDNR must examine plans and approve "any modification or alteration of an existing industrial pretreatment facility which may affect the quality or quantity of the discharge to a sewerage system." Wisconsin Administrative Code, Chapter NR 108.02(13)(f); NR 108.03.

that Atlantic States' notice never gave the government entities an opportunity to act:

> What is not known is whether Stroh and the MMSD would have taken additional, different, and/or quicker steps to resolve these problems at point source No. 4 had point source No. 4 been specifically mentioned in Atlantic's earlier notice. . . or in a subsequent notice. Stroh and the MMSD should have been given that chance. Atlantic had easy access to all the records of Stroh's violations. The imposition on Atlantic to give specific notice as to violations at another point source and file an amended complaint was minimal in light of the important goals that may have been achieved by that notice (i.e., remedy of the violations and avoidance of a lawsuit.)

(Appendix A, A-13-14)

Thus, the Seventh Circuit has ignored one of the two purposes of notice by finding that the "key to notice is to give the accused company the opportunity to correct the problem". (Petition, 13-15; Appendix B, B-10) As this Court recognized in Hallstrom, the 60 day notice serves two important purposes. The notice not only gives the alleged violator "an opportunity to bring itself into compliance with the act" but also "allows government agencies to take responsibility for enforcing environmental regulations." Hallstrom, 493 U.S. at 29, citing Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60, 108 S.Ct. 376, 383, 98 L.Ed.2d 306 (1987).

Government agencies cannot properly assume this responsibility when the citizen-plaintiff provides a vague notice:

> When the notice is precise, sixty days is none too much time for an agency to resolve on a course of action and take necessary steps whether to settle the matter or bring an enforcement action. But if the notice is imprecise, and requires the agency to develop on its own what the scope of the alleged violations are, then it becomes entirely impractical for the notice provision to fulfill its purpose in such a short time period.

California Sportfishing, 905 F.Supp. at 799.

III. A single exceedence of one milligram based upon a faulty laboratory test does not make a "continuing violator".

In addition to making claims related to MMSD outfalls 3 and 4, Atlantic States asserts in its Brief in Opposition that Stroh is a "continuing violator" at WDNR outfall 003. (Brief in Opposition, p. 13-14, n. 3) On November 8, 1988, Atlantic States sent a 60-day notice of intent to sue to Stroh identifying alleged exceedences at WDNR outfall 003. DNR outfall 003 is simply a storm water catch basin in the Stroh parking lot. No process wastewater is discharged through DNR outfall 003.

In February, 1992, Stroh reported a one milligram per liter exceedence of its permit limitation for oil and grease at DNR outfall 003. The laboratory reporting this one milligram exceedence later admitted a process error in the testing for that day. The Seventh Circuit would nevertheless allow Atlantic States

to pursue this claim, despite the fact that the only post-complaint exceedence that has ever been alleged occurred over three years after the 60-day notice. To reach this result, the Seventh Circuit has stretched the meaning of "ongoing or intermittent" to an unreasonable extreme.

The practical impact of the Seventh Circuit's decision reaches far beyond this case. Under the Seventh Circuit's rule, a company may be labeled as an "ongoing or intermittent" violator, even if the citizen-plaintiff can show only one post-complaint exceedence which is of minuscule proportions, which is based upon a faulty laboratory test on parking lot run-off, and which comes years after the original notice.

CONCLUSION

The petitioner, Stroh Die Casting Co., respectfully requests that the Court grant the petition for a writ of certiorari.

Dated at Milwaukee, Wisconsin this 7th day of November, 1997.

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